BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

OPINION BELOW.

The opinion of the Circuit Court of Appeals (R. 413) has not yet been reported.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on May 11, 1945, (R. 419) and a petition for rehearing was denied on June 7, 1945. (R. 424) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 11 and 13 of the Rules of Criminal Procedure promulgated by this Court May 7, 1934.

STATEMENT OF THE CASE.

Petitioner was convicted in the District Court for the Western District of Louisiana, under Counts Two and Three of an indictment charging him with carrying on the business of a retail liquor dealer without paying the special tax as required by law. (R. 1-4)

Before trial petitioner filed a motion to quash the indictment on the grounds that each count thereof was uncertain and indefinite and did not set forth sufficient facts to require petitioner to answer, or to enable him to properly plead thereof. The mo-

tion to quash was overruled by the Court and petitioner reserved a bill of exception. (R. 6)

During the trial of the case the Government was permitted to introduce evidence to show an offense on July 8, 1944, in connection with Count Three of the indictment which charged that the offense was committed on or about August 8, 1944. Petitioner's objection to the introduction of this evidence was overruled and a bill of exception was reserved. (R. 73-74)

On October 28, 1944, judgment was rendered. On Count Two of the indictment petitioner was sentenced to serve eighteen months in the penitentiary. On Count Three imposition of sentence was suspended and petitioner was placed on probation for a period of five years. (R. 372-373, 391)

On appeal to the Circuit Court of Appeals for the Fifth Circuit the judgment of the trial Court was affirmed. (R. 419)

ASSIGNMENT OF ERRORS.

I

The Court erred in overruling petitioner's motion to quash the indictment for insufficiency.

II.

The Court erred in admitting over petitioner's timely objection evidence of an offense on July 8, 1944, in connection with Count Three of the indict-

ment which charged that the offense was committed on or about August 8, 1944.

STATUTES INVOLVED

The Internal Revenue Code (Title 26 USCA) provides in part:

"Section 3253. *Penalties and forfeitures for non payment of special tax.*

> Any person who shall carry on the business of a *** retail liquor dealer, ** and willfully fails to pay the special tax as required by law, shall, for every such offense, be fined not less than $100 nor more than $5,000 and be imprisoned for not less than thirty days nor more than two years. **** 53 Stat. 391."

"Section 3254. (c) *Retail dealer in liquors.*

> Except as otherwise provided, (1) every person who sells, or offers for sale, foreign or domestic distilled spirits, wines, or malt liquors in less quantities than five wine-gallons to the same person at the same time, shall be regarded as a retail dealer in liquors: *** (53 Stat. 391)

"Section 3271. *Payment of tax.*

> (b) *Due date.* All special taxes shall become due on the 1st day of July in each year, or on commencing any trade or business on which such tax is imposed. In the former case the tax shall be reckoned for one year, and in the latter case it shall be reckoned proportionately, from the 1st day of the month in which the liability to a special tax commenced, to and including the 30th day of June following." (53 Stat. 394)

"Section 3278. *Liability in case of business in more than one location.*

> The payment of the special tax imposed shall not exempt from an additional special tax the person carrying on a trade or business in any other place than that stated in the collector's register; *****" (53 Stat. 395)

ARGUMENT

Petitioner's motion to quash the indictment was based on the contention that it was uncertain, indefinite and did not set forth sufficient facts to require him to answer or to enable him to properly plead thereto. R.5-6)

> The United States Constitution provides:
>
> "In all criminal prosecutions the accused shall enjoy the right*** to be informed of the nature and cause of the accusation." Amendment VI.
>
> "Nor shall any person be subjected for the same offense to be twice put in jeopardy of life or limb." Amendment V.

Counts Two and Three of the indictment, upon which petitioner was convicted, alleged only that on or about June 2nd and August 8th, 1944, he had carried on the business of a retail liquor dealer in Sabine Parish, Louisiana, without payment of the required special tax. (R. 2-3) Neither count alleged any additional facts descriptive of the offense charged, its time, place, or other circumstances, whereby petitioner could identify the alleged offenses and prepare his defense, or whereby, if he were convicted, the in-

dictment and the judgment would protect him from future prosecutions for the same offenses.

We think this proposition is clearly demonstrated by the question of variance presented by the admission over petitioner's objection of evidence of an offense on or about July 8, 1944, which had not been charged in either count of the indictment.

On the trial of the case in connection with Count Three of the indictment wherein the offense charged was alleged to have been committed on or about August 8, 1944, the prosecution offered evidence to prove that the offense had in fact been committed on July 8, 1944. Petitioner objected to the introduction of this evidence on the ground that it was not admissible under the indictment and he was not prepared to meet it. The Court overruled the objection holding that time was not of the essence of the offense charged, and that evidence of a sale any time prior to the date of the indictment and within the statute of limitations would be admissible. To this ruling, petitioner reserved a bill of exception. (R. 73-74)

Under this ruling of the Court the dates set forth in the indictment gave petitioner no notice of the time at which the prosecution would seek to show him guilty of the offenses charged. Evidence offered in connection with either count of the indictment would be equally admissible in support of the other and proof

of an offense at any time within the statute of limitations and prior to the indictment could convict him of either, or both counts.

Even under the Circuit Court's opinion interpreting the tax statutes involved, there would have been no liability for the license tax in July 1944 for engaging in the business in August 1944 as charged. And who can say that this was the identical crime which the grand Jury had in mind in approving the indictment?

Under Section 3271 of the Internal Revenue Code (53 Stat. 394) tax liability is incurred in the month in which the business is commenced and covers the remaining months of the tax year on a prorata basis. Consequently, a payment of the tax for part of the year, or a judgment of conviction for failing to pay the tax for part of the year, would not bar a subsequent prosecution for carrying on the business without having paid the tax at an earlier date in the tax year.

In the instant case, petitioner was convicted under Count Three of the indictment with an offense on or about August 8, 1944, yet all of the evidence offered related exclusively to transactions on July 8, 1944. Neither the indictment nor the judgment would protect petitioner from now being charged with an offense on July 8, 1944. The same evidence could be

used to convict him again except for the unusual circumstance that the evidence here was transcribed and is available. The same proposition would be true with respect to a future prosecution for offenses on dates prior to June 2, 1944.

The allegation of place was insufficient because under it the prosecution would be permitted to introduce evidence to prove either offense at any place in the Western District of Louisiana, and under Section 3278 of the Internal Revenue Code (53 Stat. 395) an additional tax and penalty could be imposed with respect to each separate location at which the business of retail liquor dealer was carried on without having paid the tax.

The indictment contained nothing from which petitioner, who was presumed to be innocent, could derive knowledge as to when and where within the jurisdiction of the Court, or under what circumstances the prosecution intended to prove either of the alleged offenses.

The rule upon this subject, which has been repeatedly stated, is that a defendant in a criminal case, in view of his presumed innocence, is entitled to know from the statements of the indictment not only what facts the prosecution considers sufficient to make him guilty of the offense charged, with reasonable particularity, so that he may make proper defense thereto,

but also that the indictment shall charge all of the essential facts so specifically that the judgment rendered would be a complete defense to a second prosecution.

In the case of *Ledbetter v. United States*, 170 U. S. 606-614, L. Ed. 1162, 1165, this Court had occasion to consider an indictment similar to that in the present case. The indictment there charged defendant with carrying on the business of a retail liquor dealer on the —— day of April, 1896, in the County of Appanoose, in the Southern District of Iowa. No other facts were given. Defendant was tried and after conviction, attacked the sufficiency of the indictment by a motion in arrest of judgment. The court, after discussing the sufficiency of the indictment, sustained the action of the trial court in overruling the motion in arrest of judgment, but stated:

> "We do not wish to be understood as approving the practice that was pursued in this case, or even as holding that this indictment might not have been open to special demurrer for insufficiency as to the allegations of time and place, but upon motion in arrest of judgment we think it is sufficient."

The Circuit Court's opinion (R. 416) seems to hold that the question of insufficiency must be raised by special demurrer and the defect, if any, could have been cured by an application for a bill of particulars.

While this Court in that part of its opinion in the

Ledbetter case, quoted above, referred to a special demurrer, the Court in the opening sentence of its opinion stated:

> "The defendant did not demur to the indictment, nor move to quash or take advantage of its alleged insufficiency upon the trial, ****"

The title or form of a pleading is not determinative if the question is raised and brought to the attention of the Court. It was presented by petitioner's motion to quash, just as effectively as if by demurrer. In the case of *Lynch v. United States*, 10 F. (2d) 947, the sufficiency of an indictment was attacked by a general motion to quash. On appeal the motion to quash was sustained and the trial Court's judgment was reversed.

If the indictment was insufficient because it did not meet constitutional requirements, a bill of particulars would not have made it good. Moreover, the granting of a bill of particulars is discretionary with the trial Court and petitioner had a constitutional right to be tried, if at all, under a valid and sufficient indictment.

In the case of *Armour Packing Company v. United States*, 209 U. S. 56-83, 52 L. Ed. 681-695, it was said:

> "This court has frequently had occasion to hold that the accused is entitled to know the nature and cause of the accusation against him, and

> that a charge must be sufficiently definite to enable him to make his defense and avail himself of the record of conviction or acquittal for his protection against further prosecutions, and to inform the court of the facts charged, so that it may decide as to their sufficiency in law to support a conviction, if one be had, and the elements of the offense must be set forth in the indictment with reasonable particularity, of time, place, and circumstances. And it is true it is not always sufficient to charge statutory offenses in the language of the statutes, and, where the offense includes generic terms, it is not sufficient that the indictment charge the offense in the same generic terms, but it must states the particulars."

In the case of *Turk v. United States*, 20 Fed. (2d) 129, 130, the Circuit Court of Appeals, Eighth Circuit, reversing a judgment of the trial court, held:

> "The information in this case utterly fails to comply with this rule. It confines the possible proof of the commission of each of the offenses to no time within three years, to no place within the jurisdiction of the court, to no identifying circumstances, and a judgment upon it would not protect the defendant against a second prosecution for the commission of the same offense at any time within the three years and at any place within the jurisdiction of the court."

See also:

> *Partson v. United States*, 20 F. (2d) 127;
> *Jarl v. United States*, 19 F. (2d) 891;
> *Lynch v. United States*, 10 F. (2d) 947.

We believe that the indictment here also failed to comply with the rule and was insufficient to such an

extent that it violated petitioner's constitutional rights and that, therefore, the motion to quash should have been sustained.

Respectfully submitted,

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